

In The  
**Supreme Court of the United States**

OCTOBER TERM, 1975

NO. 75-1841

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GREAT LAKES DREDGE & DOCK COMPANY,

Petitioner,

-against-

DEPARTMENT OF TAXATION AND FINANCE  
OF THE STATE OF NEW YORK,

Respondent.

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**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI TO THE COURT OF  
APPEALS OF THE STATE OF NEW YORK**

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Supreme Court, U. S.  
FILED

JUL 20 1976

MICHAEL RODAX, JR., CLERK

**TABLE OF CONTENTS**

	Page
Preliminary .....	1
Question Involved .....	1
Statement of the Case and Opinions Below .....	2
<b>ARGUMENT</b>	
No substantial constitutional question was raised nor created in the Courts below. ....	4
Conclusion .....	5
Appendix .....	A-1

**Statute Citations**

28 United States Code, § 1257 .....	4
New York Tax Law, § 1115 (a)(8) .....	2

**Case Citations**

<i>Amalgamated Food Employees Union v. Logan Valley Plaza</i> , 391 U.S. 308, 334 (dissent) (1968) .....	4
<i>Cardina v. Louisiana</i> , 394 U.S. 437, 439 (1969) .....	4

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**Preliminary**

The petitioner contends that the New York Court of Appeals in reviewing the judgment of the Appellate Division of the New York Supreme Court and confirming the determination of the New York State Tax Commission has impermissibly burdened interstate commerce and denied petitioner's constitutional rights to due process of law and to equal protection of the law.

**Question Involved**

Does the petitioner raise a substantial federal question in compliance with the jurisdictional requirements of 28 U.S.C. § 1257?

### Statement of the Case and Opinions Below

The petitioner conducted dredging operations in the Hudson River in Albany County, New York, in Lake Erie in Erie County, New York and in waters of New York City. On November 8, 1968, the respondent, Department of Taxation and Finance of the State of New York issued against the petitioner a notice of determination and demand for unpaid sales and use taxes. The imposition of the taxes was based on use of dredges, cranes, a drillboat, tugboat, scows and supplies by the petitioner in its dredging operations.

The petitioner obtained an administrative hearing before the New York State Tax Commission on the validity of the imposition of the tax. At the hearing the petitioner claimed an exemption from the taxes imposed by reason of (1) the interstate commerce clause of the United States Constitution and, (2) New York Tax Law, section 1115 (a) (8) providing for the exemption of "commercial vessels primarily engaged in interstate or foreign commerce\*\*\*\*". The exemption was claimed with respect to (a) dredges, drillboats and cranes; (b) tugboats; (c) scows towed by tugs and the supplies purchased for them, and; (d) launches and oil barges used in conjunction with other vessels.

During the hearing, the amount of tax imposed was redetermined to be \$288,134.28 plus penalty and interest computed on that amount.

The Commission in its final determination, which is not reported, found that the dredging equipment was moved across State lines for the purpose of assembling at a job site and, of course, dispersing after the job is completed but that in general the movement of dredging equipment was restrictively limited. The actual work was performed while the dredge was fixed in one place by a special type of anchor which extended to the floor of the harbor or riverbed. It was specifically found that dredges, drillboats and cranes did not move across State lines while engaged in their usual work tasks. Some tugboats and scows which were used to haul disposal materials did cross State lines to dump their loads.

The Commission also found that the evidence submitted by the petitioner was not sufficient to show that the activities of its dredging equipment together with all the other evidence, brought the equipment within the exemption provisions of the New York tax statutes. In its decision, the Commission modified the penalty and interest portion of the tax assessment by limiting them and as modified sustained the tax determination.

The petitioner obtained judicial review of the decision of the New York State Tax Commission. The Appellate Division of the New York Supreme Court (opinion reported at 46 N.Y. A D 2d 533) annulled the decision of the New York State Tax Commission and concluded that the waterways petitioner dredges are "the very arteries of interstate travel" and thus reasoned that the business of improving them must be construed as interstate commerce whether the contemplation of the exemption from tax under the provisions contained in New York Tax Law, § 1115, subd. (a), para. (8). The Appellate Division on the judicial review stated that "the petitioner here is not pressing any constitutional claim; it merely desires an exemption within the existing tax structure."

On appeal, the New York Court of Appeals reversed the Appellate Division and confirmed the determination of the New York State Tax Commission. The Court stated:

"The sole issue, as limited by petitioner's brief, is whether vessels and supplies used in connection therewith are entirely exempt from the sales and use tax by virtue of the provisions of paragraph 8 of subdivision a of section 1115 of the Tax Law which exempts from such tax '(c) commercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs\*\*\*\*.' " (Opinion reported at 39 N Y 2d 75.)

The opinion of the New York Court of Appeals is set forth in full in the appendix attached to petitioner's petition.

The remittitur of the Court of Appeals does not state that a constitutional question was either raised by the petitioner or passed upon by that Court.

### ARGUMENT

#### **NO SUBSTANTIAL CONSTITUTIONAL QUESTION WAS RAISED NOR CREATED IN THE COURTS BELOW.**

It is a jurisdictional requirement that a substantial constitutional question be raised in a State Court before the question can be reviewed by a writ of certiorari in this Court (28 U.S.C. 1257; *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334 (dissent) (1968); see also *Cardina v. Louisiana*, 394 U.S. 437, 439 (1969). The petitioner did not, nor does it claim to have raised, any constitutional question in the Courts below. It contends, however, that the effect of the opinion of the New York Court of Appeals was to create substantial constitutional questions by reversing the judgment of the Appellate Division of the New York Supreme Court and confirming the final administrative determination of the New York State Tax Commission. The petitioner further contends that since the constitutional questions were created by the highest Court of New York, it is now permitted to raise the questions for the first time in this Court.

It is submitted that the petitioner's contentions are erroneous. When petitioner first sought court review of the New York State Tax Commission's determination it could have raised the constitutional questions which it now asserts. It did not nor did it attempt to do so then nor did it do so in the New York Court of Appeals.

### CONCLUSION

**FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.**

Dated: Albany, New York  
July 13, 1976

Respectfully submitted,  
LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Respondent

RUTH KESSLER TOCH  
Solicitor General  
FRANCIS V. DOW  
Assistant Attorney General

of Counsel

## Court of Appeals

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State of New York, ss:

PLEAS in the Court of Appeals,  
held at Court of Appeals Hall,  
in the City of Albany, on the  
.....13th day of February.....  
in the year of our Lord one  
thousand nine hundred and  
.....seventy-six....., before the  
Judges of said Court.

WITNESS,

The HON. CHARLES D. BREITEL,  
Chief Judge, Presiding.

~~JAMES M. BARRY, Clerk~~  
Joseph W. Bellacosa, Clerk

REMITTITUR..... March 30, ..... 1976.....

3 No.  
 In the Matter of Great Lakes  
 Dredge & Dock Company,  
 Respondent,  
 vs.  
 Department of Taxation and  
 Finance of the State of New York,  
 Appellant.

Be it Remembered, That on the...17th...day  
 of...July...in the year of our Lord  
 one thousand nine hundred and...seventy...five...  
 ...Department of Taxation and Finance of the...  
 ...State of New York...  
 the appellant in this cause, came here unto the Court  
 of Appeals, by...Louis J. Lefkowitz, Attorney Gen.  
 ...of the State of New York...

...attorney, and filed in the said Court a Notice of Appeal  
 and return thereto from the...judgment...  
 of the Appellate Division of the Supreme Court in and  
 for the...Third...Judicial Department.  
 And...Great Lakes Dredge & Dock Company...

...the respondent in said cause, afterwards appeared in  
 said Court of Appeals by...McHugh, Heckman, Smith,  
 & Leonard, & its...attorneys

Which said Notice of Appeal and the return thereto,  
 filed as aforesaid, are hereunto annexed.

Whereupon, The said

Court of Appeals having heard this cause argued by

Mr.....Francis V. Dow.....

of counsel for the appellant, and by

Mr.....James M. Leonard.....

of counsel for the respondent, and after due delibera-

tion had thereon, did order and adjudge that the.....

.....judgment.....of the Appellate

Division of the Supreme Court appealed from herein be

and the same hereby is...reversed, with costs,....

the determination of the State Tax.....

Commission confirmed, and the petition.....

dismissed.....

Opinion by Gabrielli, J.....

All concur.....

And it was also further ordered, that the records afore-  
 said, and the proceedings in this Court, be remitted to the  
 Supreme Court of the State of New York, there to be  
 proceeded upon according to law.

Therefore, it is considered that the said judgment.  
 is reversed, &c., AS AFORESAID.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

*Joseph W. Bellacosa*  
 Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,

Albany, March 30, 1976

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.



*Joseph W. Bellacosa*  
 Clerk.